

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1232

To be argued by
HOWARD F. CERNY

In The
United States Court of Appeals
For The Second Circuit

B
As

ORIGINAL

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CARMINE ROTOLO,

Defendant-Appellant.

On Appeal from the United States District Court for the Eastern
District of New York.

**BRIEF AND APPENDIX FOR
DEFENDANT-APPELLANT**

HOWARD F. CERNY

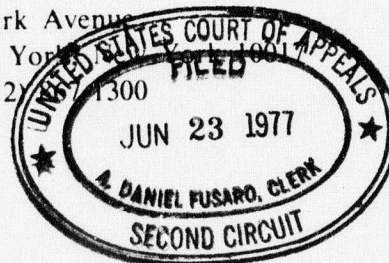
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United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA :

Plaintiff-Appellee, :

vs. :

Docket No. 77-1232

CARMINE ROTOLO, :

Defendant-Appellant. :

PRELIMINARY STATEMENT

The Appellant, Carmine Rotolo, appeals from his Judgment of Conviction and Sentence entered in the United States District Court for the Eastern District of New York (Pratt J.) on January 6, 1977. The case was tried before a jury on November 8, 9, 10 and 11, 1976 and a verdict was returned on November 12, 1976. The jury found Rotolo guilty on all seven counts of the indictment.

STATEMENT OF FACTS

The Appellant was originally charged under indictment, 76 CR 268, with three counts of aiding and abetting the

possession with intent to distribute heroin, and with three counts of aiding and abetting the distribution of heroin, all in violation of 21 U.S.C. 841 (a)(1). Thereafter, Rotolo was charged under a superseding indictment, 76 CR 268 (S), with the same six substantive counts plus an additional count of conspiracy.

In Count One, Rotolo was charged with, from August 5, 1974 to March 10, 1975, knowingly, willfully and unlawfully conspiring with Frank Irace and Leonard De Metrio, both unindicted co-conspirators, to distribute heroin and possess the same with an intention of distributing it. In furtherance of said conspiracy and for the purpose of effecting the objectives thereof, the indictment alleged De Metrio committed two overt acts, namely:

1. On or about the 5th day of August, 1974, Leonard De Metrio went to a location at 86th Street and 7th Avenue in Brooklyn, New York.

2. On or about the 9th day of September 1974, Leonard De Metrio discussed the sale of heroin with defendant, Carmine Rotolo.

On Counts Two, Four and Six, Appellant is charged with knowingly and intentionally possessing heroin on three different dates, namely, August 5, 1974, September 9, 1974 and March 10, 1975, with intent to distribute the same.

In Counts Three, Five and Seven, Appellant is charged with knowingly and intentionally distributing heroin on three dates, the same dates in Counts Two, Four and Six, namely, August 5, 1974, September 9, 1974 and March 10, 1975.

Prior to trial, the Government admitted that the three dates alleged in the indictment were not dates that Rotolo committed a wrong, but instead were dates that Demetrio sold to the undercover Agent Garcia. (Tr. 11/8/76 p. 13; A1-3).*

The Government has successfully by use of the Grand Jury process, the use of 18 U.S.C. 2, and the conspiracy statute, convicted Rotolo of a crime, without proving a specific crime or the Appellant's involvement.

After indictment, and prior to trial, Rotolo was represented by a Ms. Nancy Rosner who participated in a discovery proceeding and purportedly investigated this case. Due to Ms. Rosner's previous engagements, the Court below ordered Rotolo to retain new counsel.

There was discussion at that time that Court's order,

* Tr. refers to transcript.

"A" refers to Appendix.

in lieu of the fact that Rotolo would waive his rights to a speedy trial under the new rule, would raise certain constitutional issues. The Court below stated it would welcome Appellant review of this particular problem under the Speedy Trial Act. The Appellant was therefore compelled to retain new counsel on the eve of trial and attempt to prepare his case anew. (Tr. 11/8/76, pp. 3-34; A4-35)*

The Appellant at the time of trial moved for a dismissal of the indictment on the grounds that the indictment was based on the total hearsay testimony of the Government witness, Agent Garcia. It further moved, for the dismissal of the indictment on the grounds that Rotolo had been the subject of an illegal surveillance in violation of his Fourth, Fifth and Fourteenth Amendment rights.

The Appellant further moved that alleged oral statement made by him while in custody be suppressed on the grounds that it did not constitute a confession, did not constitute an admission of material fact, and that its introduction would be prejudicial. During the course of the trial, the defense repeatedly requested the Government's cooperation in locating witnesses by identifying them by name,

* The transcript of testimony was previously forwarded to this Court and prepared at the Government's expense on a prior motion and decision.

giving their present location, or supplying to defense counsel statements made by such witnesses. This "Brady" material and information was consistently denied by the Government.

The superseding indictment essentially charges the defendant with three separate crimes and multiple counts of each crime, all of which occurred either on August 5, 1974, September 9, 1974 or March 10, 1975. Count One of the indictment charges a conspiracy and Counts Two, Four and Six charge the criminal possession of a Schedule I drug in violation of 21 U.S.C. 841. Counts Three, Five and Seven charge Rotolo with knowingly and intentionally distributing a Schedule I drug in violation of 21 U.S.C. 841.

The evidence in this case, the conduct of the Government through the U.S. Attorney and the Court's charge clearly indicate that the defendant was wrongfully convicted.

The Government failed to sustain its burden of proof as to the actual charges and the alleged proof elicited was inadmissible, irrelevant and does not reach the substantial quantum of proof to sustain a conviction.

The Government's entire case rested on the testimony of its chemist; the testimony of a Leonard De Metrio, a co-conspirator and accomplice; alleged tape recordings; an alleged admission and finally the testimony of Agent Garcia, who was never present during any transaction of the Appellant, but who testified in behalf of the Government as a principal

witness. Agent Garcia's testimony is stressed since his presence in the courtroom was challenged by Appellant during the time of trial. Agent Garcia was not excluded, on the statement by Government counsel that his testimony would refer only to the voluntariness of the witness's alleged admissions.

Agent Garcia, contrary to the U.S. Attorney's stated position, actively engaged in presentation of the Government's case. He among other things, set up the tape recording system, made contact with the jury by handing out earphone sets, and was otherwise an apparent officer of the court rather than a witness for the Government. The court's concurrence in permitting Agent Garcia to appear to be a functionary of the Court rather than a witness for the prosecution prejudiced the Appellant since his testimony appeared to be that of the Court rather than a paid representative of the Government.

POINT ONE

ROTOLO'S CONVICTION UNDER
COUNTS 2, 4 AND 6 MUST BE
REVERSED AND THE INDICTMENT
DISMISSED.

Counts 2, 4 and 6 of the superseding indictment charge Rotolo of criminal possession of narcotics in the

Eastern district of New York on August 5, 1974, September 9, 1974 and March 10, 1975.

Counts 2, 4 and 6 are distinct substantive counts and differ factually and legally from counts 3, 5 and 7, of knowingly and intentionally distributing narcotics.

The Government has the burden of proving each and every element of the crime charged and that burden remains during the entire trial, motions and post-conviction motions. That burden is substantial and not prima facie. U.S. v. Taylor, 464 F2 240 (2nd Cir. 1972).

The record is devoid of any evidence to support a conviction, actual violation under counts 2, 4 and 6; and the Government conceded it had no such evidence (Tr. 11/8/76, P.M. p. 17; A36-38).

The Court in its charge to the jury, charged actual violations of counts 2, 4 and 6 (Tr. 11/11/76, p. 639; A39-41). The Court charged aiding and abetting, 18 U.S.C. 2, only on counts 2,3 and 7. [sic]¹

1. The transcript (641) (A 42-43) refers to counts 2, 3 and 7 as opposed to counts 3, 5 and 7. It is assumed that this is a transcriptional error and the Court did charge aiding and abetting on only 3, 5 and 7. This assumption is based on the fact that the Court charged separate elements on possession, counts 2, 4 and 6, as opposed to intentional sale, counts 3, 5 and 7.

The Court in attempting to clarify its own uncertainty as to the applicability of section 2, and at the Government's insistence, charged aiding and abetting, but only to distribution, not possession (Tr. 11/11/76 p. 687; A44-46).

It is submitted that the convictions on counts 2, 4 and 6 be reversed and the indictment dismissed.

POINT TWO

ROTOLO'S CONVICTION UNDER THE SUBSTANTIVE COUNTS 2, 3, 4, 5, 6 & 7 MUST BE REVERSED AND THE INDICTMENT DISMISSED.

Rotolo was convicted of the substantive counts in the superseding indictment counts 2 through 7.² It was recognized by the Court in its charge and conceded by the Government in its opening (A37) that there existed no proof to directly link Rotolo with the actual sale by De Metrio to Agent Garcia.

The Government proceeded on the theory that Rotolo

2. Rotolo's conviction of counts 2, 4 & 6 are discussed in point one, however, at this time his conviction on all substantive counts will be discussed under the general application of 18 U.S.C. 2.

was guilty as a principal in the sale of narcotics made by De Metrio and Irace to Agent Garcia on August 5, 1974, September 9, 1974 and March 10, 1975, pursuant to 18 U.S.C.

2.

"The Government will prove that Carmine Rotolo was the source of all of the heroin that was sold to Agent Garcia on those three occasions through Leonard De Metrio and Frank Irace." (A36)

Considering the evidence in a light most favorable to the Government, the Government claims to have proved³ that in April 1974 Rotolo sold to De Metrio a quantity of narcotics. That this sale, several months later, was the source of the sales by De Metrio on August 5, 1974 and September 9, 1974 to Agent Garcia. That a second sale by Rotolo to De Metrio in March 1975 resulted in a sale by De Metrio and Irace to Garcia on March 10, 1975.

The jury convicted Rotolo of three counts of possession and three counts of knowingly and intentionally selling the narcotics to Agent Garcia on August 5, 1974, September 9, 1974 and March 10, 1975.

The Government, the Court, and the jury, have confused 18 U.S.C. 2 with conspiracy or vicarious criminal liability.

3. The Government's evidence, its weight, admissibility and probative value is covered in Points 3 and 6.

ity. The section contains no such direction:

§2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. June 25, 1948, c. 645, 62 Stat. 684; Oct. 31, 1951, c. 655, §17b, 65 Stat. 717.

Section 2 did not create a criminal act unknown at common or prior Federal law; it merely abolished the differential punishment that resulted from a person being characterized as an accessory before or after the fact. The characterizations are still used to determine when a defendant's acts and participation make him an accomplice and thus require the application of the section.⁴

Prior to the application of Section 2, the Government must prove each and every element of the substantive crime and then prove that the alleged accessory, willfully, intentionally and consciously assisted the commission of the specific crime in some active way. U.S. v. Dickerson, 508 F.2 1216 (2nd Cir. 1975).

4. U.S. v. Greer, 467 F2 1064 (7th Cir., 1972) N. 5

There must be evidence to support a finding that the defendant knowingly and intentionally was involved in the sales to Agent Garcia. The evidence may not merely show a stationary fact, they must show operative involvement in the sales. U.S. v. Harris, 435 F2 74 (1970).

It is the Government's position that having, allegedly, proved Rotolo's participation in the original sales to De Metrio, that those sales prove a substantive violation pursuant to 18 U.S.C. 2. This position is contrary to the decision of Judge Hand, in U.S. v. Peoni, 100 F2 401. Merely putting into circulation an illegal commodity, by selling or passing it to a second party, who in turn sells it to a third party, is not a violation of the "aiding and abetting" statute.

"The prosecution's argument is that, as Peoni put the bills in circulation and knew that Regno would be likely, not to pass them himself, but to sell them to another guilty possessor, the possession of the second buyer was a natural consequence of Peoni's original act, with which he might be charged. If this were a civil case, that would be true; an innocent buyer from Dorsey could sue Peoni and get judgment against him for his loss. But the rule of criminal liability is not the same; since Dorsey's possession was not de facto Peoni's, and since Dorsey was not Peoni's agent, Peoni can be liable only as an accessory to Dorsey's act of possession. The test of that must be found in the appropriate federal statute (§550 of Title 18, U.S. Code, 18 U.S.C.A. §550). The first statute dealing with the matter was passed in 1790 (1 St. at L. 114) and made those accessories who should "aid and assist, procure, command, counsel or advise", murder or robbery on land or

sea, or piracy at sea. Section 10. This was broadened in 1870 (16 St. at L. 254) to include any felony, and by it an accessory was anyone who "counsels, advises or procures" the crime, section 2: this phrase was probably regarded as an equivalent of the first. Both those statutes were repealed in 1909 by §341 of the Criminal Code (35 St. at L. 1088, 1153), and supplanted by §332 of that act, which like §550 of Title 18 U.S. Code, 18 U.S.C.A. §550, read as follows: "aids, abets, counsels, commands, induces, or procures". The substance of that formula goes back a long way. Pollock & Maitland, Vol. II, p. 507, in speaking of the English law at the beginning of the 14th Century, say that already "the law of homicide is quite wide enough to comprise * * * those who have 'procured, counselled, commanded or abetted' the felony"; citing Bracton, f.142, as follows: "for it is colloquially said that he sufficiently kills who advises" (praecipit) the killing. In 1557, by chapter 4 of 4 & 5 P. & M., benefit of clergy was taken away from those who should "command, hire and counsel" another to commit petit treason, murder, robbery or "willful" arson; and the indictment in Parker's Case, 1560, Dyer 186 a, read that the accused had "counselled, commanded, procured and abetted" the murder. Coke, Inst. II, p. 182, in commenting on the Stat. of West 1. Chap. XIV, which dealt with accessories, declared that they were divided into three "branches"; "Commandment" was "praeceptum" which included those who "incite, set on or stir up" others to the deed. "Force" was to furnish a weapon; and "aide" ("auxilium") included "all persons counselling, abetting, plotting, assenting, consenting or encouraging to do the act." In 1691, by Chapter 9 of 3 & 4 W. & M., benefit of clergy was denied those who "comfort, aid, abet, assist, counsel, hire or command" certain enumerated felonies. Hale, Pleas of the Crown p. 615, 1736, defined an accessory as one who "doth * * * procure, counsel, command or abet another". In The Case of Macdaniel & others, 1755, Foster, 125, the question was bruited whether one might be an accessory at one remove, and it was said, though

obiter, that he might, for "whoever procured a felony to be committed though it be by the intervention of a third person is an accessory * * * For what is there in the notion of commanding, hiring, counselling, aiding or abetting which may not be effected by the intervention of a third person." Blackstone, 1768, Book IV, pp. 36 & 37, described an accessory as "he who in any wise commands or counsels another to commit an unlawful act". Hawkins, 1771, Pleas of the Crown Chap. 29 §16, specified "Those who by Hire, Command, Counsel or Conspiracy; and it seems to be generally holden, That those who by shewing an express Liking Approbation or Assent to another's felonious Design of committing Felony abet and encourage him to commit it".

[1] It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used--even the most colorless, "abet"--carry an implication of purposive attitude towards it. (Emphasis added.)

The Government, if it has proved anything, has allegedly proved a sale of narcotics by Rotolo to De Metrio.⁵ It has not proved, factually or legally, Rotolo's guilt beyond a reasonable doubt the substantive allegations of counts 2 through 7.

5. This Court should consider, as has the defense, why the Government did not bring an action on the alleged sale by Rotolo to De Metrio, rather than bringing the involved action, sub judice.

It is submitted that the convictions on counts 2 through 7 be reversed and the indictment dismissed.

POINT THREE

ROTOLO'S CONVICTION ON COUNTS 1 THROUGH 7 SHOULD BE REVERSED AND THE INDICTMENT DISMISSED ON THE GROUNDS THAT THE GOVERNMENT HAS FAILED TO PROVE A VIOLATION OF LAW.

The Government's witness, chemist Anthony Fonseca, testified as to the analysis of Government's Exhibits 1, 2 and 3. Prior to this testimony, Rotolo was requested to stipulate to the chemist's testimony. The stipulation as prepared by the Government was rejected by Rotolo, but he offered to stipulate to the chemist's analysis of certain packages as being accurate and in conformity with accepted procedures. The defense would not stipulate that the material analyzed was relevant to the case or that there had been a proper chain of custody. The Government rejected this stipulation and chose to call the chemist over defendant's objection.

The chemist testified that he received Government's Exhibit 1 on August 6, 1974, and after analysis he testified that it contained heroin hydrochloride and sugar; heroin hydrochloride in the amount of 26.3%; that on September 11, 1974, he received Government's Exhibit 2 and it contained

heroin hydrochloride and sugar with heroin hydrochloride in the amount of 20.6%. That on March 12, 1975, he received Government Exhibit 3, and after analysis it contained heroin procaine and sugar with heroin hydrochloride in the amount of 5.6%.⁶

Granting the Government a favorable inference, the chemist testified that under his normal procedure he had received Exhibits 1, 2 and 3 from the evidence technician.

Garcia testified that he received Exhibit 1 on August 5, 1974 and purchased an alleged "one ounce of heroin" (Tr. 11/10/76 p. 328, A50-52), and that there were 25.5 grams to an ounce. The chemist testified that Exhibit 1 had a net weight of 25.7 grams including sugar as a dilutant.

The Government's witness De Metrio, testified that he purchased the drugs in April of 1974 from the Appellant (Tr. 11/9/76 p. 111, A53-55); that he purchased 4 ounces of a white powdery substance that he could not state was heroin; That he kept this four ounce purchase and he, Frank Irace and Frankie Mambo,* cut the alleged drugs.

6. The percentages express a relationship "that means for every 100 parts of powder, 26.3 would be heroin hydrochloride" (Tr. 11/8/76, P.M. p. 34; A47-49).

* Frankie Mambo is later identified as a paid Government informant and undercover agent of the Government.

It is alleged that it is from this April sale by Rotolo to De Metrio that Agent Garcia purchased Exhibit 1 from De Metrio.

Agent Garcia* testified that, on September 9, 1974, he purchased an additional "one ounce of heroin" from Frank Irace, (Exhibit 2).

De Metrio testified that the second sale was from his April 1974 purchase from Rotolo.

The chemist testified that Government's Exhibit 2 weighed 20.2 grams, including sugar.

Agent Garcia testified that on March 10, 1975 he purchased "two ounces" of heroin from De Metrio, Irace and Mambo, the Government agent. (Exhibit 3)

The chemist testified that Exhibit 3 was totally different from Exhibit 1 and 2. It was heroin procaine with only a 5.6% heroin hydrochloride content; and it came from another country (Tr. 11/6/76, pp. 41-42; A56-59).

De Metrio testified that he made an additional purchase from Rotolo of four ounces of heroin in March from which Exhibit 3 was sold to Agent Garcia.

* Agent Garcia's testimony, its admissibility and prejudicial effect will be covered in Point 6.

Granting the Government every possible inference, it is clear that the chemist's testimony, which was objected to and permitted only subject to connection, was not relevant to this case.

The chemist could not testify to the source of the hibits he analyzed. Agent Garcia prior to De Metrio's arrest did not know the existence of Rotolo.

De Metrio testified he purchased from Rotolo months before the sale to Garcia. In addition, he admits changing the contents, the containers and having them out of his possession for long periods of time.

The Government to make out a prima facie case on counts 1 through 7 must prove at a minimum a violation, some violation, of 21 U.S.C. §841, by Rotolo. This violation should be clear, convincing and attributable to the Appellant.

The Government proved on its own that the material analyzed by its own chemist was not the material allegedly sold by Rotolo to De Metrio; that De Metrio was in and out of possession of the material for months; that a Government informant could have testified to the exact material in issue, but was not called; in short the chemist's testimony was prejudicial to the Appellant and should have been excluded.

Rule 403. Exclusion of Relevant Evidence on
Grounds of Prejudice, Confusion, or Waste of
Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. 28 U.S.C.A. Rule 403.

It is submitted that the Government's proof, through its technical witness, Anthony Fonseca, should have been excluded and with the exclusion of that testimony the Appellant's conviction should be reversed and the indictment dismissed.

POINT FOUR

ROTOLO'S CONVICTION ON COUNT 1
MUST BE REVERSED AND THE INDICT-
MENT DISMISSED.

Rotolo was convicted on Count 1 of a conspiracy to violate 21 U.S.C., 841(a)(1) and 21 U.S.C. 846.

In effect, Rotolo was convicted of conspiring with De Metrio and Irace on the sales of narcotics to Agent Garcia on August 5, 1974, September 9, 1974 and March 10, 1975.

It is conceded that a charge of conspiracy is a distinct crime separate and apart from the substantive crimes. It is an evil that may be proscribed, separate and apart from the

crime itself. This concession, however, does not mean that the Appellant agrees.⁷

Conspiracy is a consensual agreement between more than two people to accomplish an illegal act and that act must be specific and capable of performance at the time of agreement. U.S. v. Peoni, 100 F2 401, 403.

Mr. Justice Jackson's eloquent summary and criticism of the law of conspiracy in his concurring opinion in Krulewitch v. U.S., 336 U.S. 440, 69 S.Ct 716, exemplifies the very evil of this case.

The Government charges Rotolo with a substantive crime it can not prove, it then at the time of trial alleges "aiding and abetting" that crime and finally to confuse the issue alleges conspiracy.

"The modern law of conspiracy is almost entirely the result of the manner in which conspiracy was treated by the Court of the Star Chamber." Krulewitch, supra, 721.

It is clear in this case that the Government charged conspiracy because it knew it could not prove a substantive crime, a procedure condemned over and over.

7. The Court's distinction of merger of conspiracy and the substantive crime should be reconsidered. The application of "Wharton's Rule" should not be restricted to mathematical numbers. The Court should inquire into the alleged crime.

"Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions. The important considerations of policy behind such warnings need not be again detailed. See Jackson, J., concurring in Krulewitch v. United States, supra. It is these considerations of policy which govern our holding today. As this case was tried, we have before us a typical example of a situation where the Government, faced by the bar of the three-year statute, is attempting to open the very floodgates against which Krulewitch warned. We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because the conspiracy is kept a secret, and merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished."

In essence a count in conspiracy must fail when the Government fails to prove an agreement to do a specific illegal act; conspiracy is not proved by proof of an agreement to act generally contrary to the law. Conspiracy is a prior agreement to act, the act itself, i.e. Rotolo's alleged sale to De Metrio. U.S. v. Freeman, 498 F2 569 (2 Cir 1974).

POINT FIVE

THE CONVICTION BELOW CANNOT BE SUSTAINED BY THE USE OF THE TAPES AND THE USE OF THE TRANSCRIPT OF THE TAPES WAS HIGHLY AND FATALLY PREJUDICIAL TO THE APPELLANT.

The Court, over objection of the Appellant, permitted

certain surreptitious tape recordings to be played to the jury. In addition, it permitted transcripts of those tape recordings to be used by the jury in aid of listening to conceded inaudible tapes. The Government, in offer of these transcripts, laid a foundation that Leonard De Metrio testified to the accuracy of the transcripts. On cross examination, De Metrio testified that he had not seen the transcripts until approximately two weeks prior to the trial. He further testified, that at the time he was recording the conversations, as a Government agent, he was unfamiliar with the recording device and more importantly was under the influence of drugs.

The use of the written transcripts by the jury, and their admission into evidence, severely prejudiced the Appellant. De Metrio's testimony that they were an accurate reproduction of the conversations he allegedly had with Rotolo is in issue. He did not see the transcript immediately after its reproduction and while extended oral conversations may have been fresh in his mind, the actual conversations were allegedly made while De Metrio was under the influence of a drug: a drug the Government recognizes as a debilitating substance.

Prior to the introduction of the tapes and particularly the transcript, the District Court judge, in the presence of defense counsel, should have methodically reviewed the tapes and corresponding transcripts to insure

their conformity. United States v. Turner, 528 Fed. 2nd 143 (1975). Nor, is this an issue where the actual words used in the tape and the transcript is not in issue. It is not the making or the creation of the tape which precludes its admissibility on this point, but the admissibility of the actual content of the tape. United States v. Gonzales, 537 F.2d 1051 (1976).

That the co-conspirator De Metrio tape recorded conversations with the present Appellant is not in issue. What is in issue is the accuracy of admittedly inaudible tapes with gaps, and the use of a typewritten transcript of the tapes by the jury to determine the actual content of the tapes. The actual word by word content of the tapes becomes important when the Court realizes that specific and individual words and their meaning were used by the Government on their direct case. De Metrio's explanation of the words "shit", "it" and "coke," among other terms, was a critical step in the Government's case.

Certainly prior to the witness being permitted to testify to "street terms," those terms should have been proven to have been said.

The tapes were allegedly used by the Government to show intent and knowledge. The Government never claimed a

use of the tapes to show a substantive crime.

"where a tape recording is objected to as unintelligible or inaudible its admissibility is within the sound discretion of the trial judge. United States v. Hodges, 480 F.2d 229, 233-34 (10th Cir.). Unless the unintelligible portions are so substantial as to render the recording as a whole untrustworthy, it may be admitted; this is especially so where a witness who heard the statements also testifies and the recording gives independent support to his testimony. Monroe v. United States, 98 U.S. App. D.C. 228, 234 F.2d 49, 55, cert. denied, 352 U.S. 873, 77 S.Ct. 94, 1 L.Ed.2d 76,." United States v. Jones, 540 F.2d 465 (1976).

This citation, although apparently favorable to the Government, suggests the proper analysis for the admission of the tapes. Where the admission of the tapes and transcripts depends upon the testimony of the accomplice and present Government witness, and where his very identification of the transcripts and tapes is tainted by time and the use of drugs, and where the Government places reliance on the uttering and use of specific words, then the tapes and the transcripts are no longer admissible under the sound discretion of the Court. The disputed portions are so substantial as to prejudice the entire trial in the case.

It is respectfully submitted that the introduction of the tapes in this case, and the transcripts, and permitting De Metrio to testify, was substantial error and demands reversal of the conviction in this case.

POINT SIX

THE FAILURE TO EXCLUDE AGENT
GARCIA WAS PREJUDICIAL TO THE
DEFENSE.

The defense requested the exclusion of Agent Garcia as a principal Government witness under the normal exclusionary "rule." The Government opposed this motion and was successful.

The rule exists and is accepted by our Courts for the simple reason that a witness should not hear other testimony before he or she testifies. The rule is unavoidable under English procedure and is generally recognized under our procedure. The only recognized exception is that a party to an action may not be excluded. However, Agent Garcia was not a party to the action.

Perhaps Agent Garcia's physical presence was not in and of itself prejudicial. This Court may agree with the trial court's use of discretion under the rule concerning physical presence. However, this Court cannot and should not condone that witnesses use during the trial to actively present the Government's case, which included actual contact with the jury, the establishment of a rapport with the jury, conversations with the jury, and the trial court's apparent sanctioning of these acts.

Agent Garcia's testimony could not have been accepted by the jury in the same manner as another's testimony. His

bias, prejudice and recollection, although challenged, must be rejected -- didn't the Court permit him to speak, didn't the Court permit him to set up tape machines, didn't the Court permit him to use the machines, didn't the Court clothe him in the mantle of justice and truth.

Agent Garcia's testimony was essential to the government's conviction in this case. In reviewing this testimony, this Court should consider whether it would permit the testimony of the trial judge's clerk or the U.S. Attorney to testify on issues before a jury after having assisted the Court in trying the case. A witness clothed by the majesty of the Court is a witness the jury is conditioned to believe.

The Government's options were clear, Agent Garcia could assist or testify. He could not do both. U.S. v. Clancy, 276 F.2d 617, 636

POINT SEVEN

CUMULATIVE ERROR REQUIRES
REVERSAL OF THIS CONVICTION.

Aside from the specific points mentioned above, this case is seasoned with cumulative error which in the interest of justice requires a reversal of the conviction.

(a) New Counsel.

The Appellant, although he waived his rights to a speedy trial, was compelled by the Court to acquire new counsel on the eve of trial. Rotolo had been represented by Ms. Rosner. On September 21, 1976, the Appellant was ordered to obtain new counsel.

An adjournment of the case was requested by Ms. Rosner on the grounds of prior commitment. The request for adjournment was opposed by the Government in "the interest of justice." The Government's position was that justice would be best served if Rotolo acquired new counsel and be prepared for trial in "one week."

The right to a speedy trial is primarily a right of the defendant. In some instances, after long and protracted delay, the Government has a right to trial in order to protect witness or preservice evidence. In this case the Government made no showing of any prejudice it might suffer, but only pressed the speedy trial rules, a right of the defendant.

The Court directed the Appellant to obtain new counsel but admitted it would welcome appellate review of the question.

(b) Grand Jury.

Rotolo moved to dismiss the indictment on the grounds it was believed to have been secured on total hearsay. During the trial it was established that the indictment was secured only on the testimony of Agent Garcia, who was never a witness to any transaction involving the Appellant.

The Court's failure to at least inspect the Grand Jury minutes in camera before deciding this motion was error.

(c) Admissions.

The Court permitted Agent Gracia to testify to three alleged admissions by Rotolo.

(1) He did not know Frank Irace.

(2) He knew De Metrio only casually.

(3) That in response to a question by a law enforcement officer that they knew defendant's source of supply, he answered, "I know you guys know, but you can't prove it."

The Government proved these admissions by heroically showing that the defendant:

(1) Met Irace once at a football game.

(2) Occasionally had lunch with De Metrio; and

(3) never attempted to prove the defendant's alleged source.

A mere reading of the alleged admissions demonstrated their inadmissibility; however, this error was compounded by the Judge's charge which referred to the admissions as a "confession."

It is not necessary that the Court find any of the errors listed to be significant, it need only find and should find that under the "totality circumstances" the Appellant was not afforded a fundamentally fair trial. U.S. v. Newman, 490 F.2d 139 (1974).

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed or, in the alternative, in the interest of justice, a new trial should be ordered.

Dated: New York, New York

June 22, 1977

Respectfully submitted,

Howard F. Cerny

HOWARD F. CERNY
Attorney for Defendant-Appellant
200 Park Avenue
New York, New York 10017
(212) 867-1300

77-1232

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA

Plaintiff-Appellee,

vs.

CARMINE ROTOLO,

Defendant-Appellant.

On Appeal from the United States District
Court for the Eastern District of New York

APPENDIX

HOWARD F. CERNY
Attorney for Defendant-Appellant
200 Park Avenue
New York, New York 10017
(212) 867-1300

APR 11 1976

DOCKET ENTRIES

207 1

ROTOLO, CARMINE

-1 4 13

76

268

1

U.S. DISTRICT COURT

21-841(a)(1)
18-2

OFFENSES CHARGED

Did possess with intent to
distribute and did distribute
~~ENR~~ heroin

U.S. MAG.
CASE NO.

BAIL • RELEASE

AMT. \$ 000
Set Date
Bailor Made
Status of Bail
Bailor's Name
Bailor's Address
Bailor's Phone
Bailor's Signature
Bailor's Date

II. KEY DATES & INTERVALS

ARREST or

U.S. Custody Began
Summons Served
First Appearance

High Risk Date

Information ☐
4-13-76

Indict Waived ☐

In Charging
District

Superseding
Indict/Info ☒
5/6/76

MENT ☒

ARRAIGNMENT

4-23-76

1st Plea

Final Plea
5/14/76

Trial Set For

X NGT ☒ G ☐ Not

X NGT ☒ G ☐ Not

TRIAL

Voir Dire ☐

Trial Begins

11/8/76
11/17/76

Disposition
of Charges

☒ Convicted
☐ Acquitted
☐ Dismissed

SENTENCE

1/6/77
☐ On All Charges
☐ On Lesser Offense(s)
☐ WOP ☐ WP
☐ On Government's Motion

MAGISTRATE

Search Warrant ☐ Issued
Summons ☐ Issued
Arrest Warrant ☐ Issued
COMPLAINT ☐

DATE

INITIAL/NO

INITIAL APPEARANCE DATE ☐
PRELIMINARY EXAMINATION ☐ Date ☐ Detained
OR ☐ Date ☐ Held
REMOVAL HEARING ☐
WAIVED ☐ NOT WAIVED ☐

HEARING

FILED

☐ DISMISSED
NEED FOR SET OR OTHER PRO-
CEEDING IN THIS DISTRICT
FILED FOR SET OR OTHER PRO-
CEEDING IN THIS DISTRICT

U.S. Attorney or Asst.

ATTORNEYS

Elia Weinbach

Nancy Rosner
401 Broadway, NYC.
925-8844

DATE DOCUMENT NO. FILED IN

- 4-13-76 Before Bramwell, J - Indictment filed
- 4-28-76 Notice of Appearance filed.
- 4-23-76 Before PLATT, J - case called - deft & atty present - Deft arraigned and after being advised of his rights and on his own behalf enters a plea of not guilty - bail contd - adjd to May 7, 1976 for setting date for trial.
- 4-27-76 Notice of readiness for trial filed
- 5-4-76 Notice of motion filed, ret. May 7, 1976, for discovery and a bill of particulars, etc.
- 5-6-76 SUPERSEDING INDICTMENT FILED-S
- 5/7/76 Before PLATT, J.- Case called- no appearance- motion for bill of particulars withdrawn
- 5-14-76 Before PLATT, J - case called - deft & counsel present - deft arraigned and after being advised of his rights enters a plea of ~~guilty~~ not guilty to the superseding indictment - bail contd - all motions within 10 days - adjd to May 28 for status report.

9/76 Notice of readiness for trial filed

5-24-76 Notice of motion filed for discovery and bill of particulars, etc. (ret. May 28, 1976)

6/4/76 Before PRATT, J.-Case called- deft and counsel present-case adjd to 6/21/76 at 10:00 A.M. for trial case adjd to 6/11/76 for motions

6-11-76 Govts Memorandum of Law filed in oppositon to defts motion

6/11/76 Before PRATT, J.- Case called- deft and counsel present- motion for discovery argued- decision reserved case adjd to 9/27/76 at 10:00 A.M. for trial

9/20/76 Before PRATT, J. - Case called. AUSA Gould present. Counsel present. Deft not present. Adj'd to 9/21/76 at 9:00 a.m. for status conference.

9/21/76 Stenographers transcript dated 6/11/76 filed.

9-21-76 Before PRATT, J. - Case called. Deft not present. Counsel present. Court directs deft retain new counsel to replace Nancy Rosner. Adj'd to 9-22-76 at 9 am for status report.

9/22/76 Before PRATT, J. - Case called. Deft & Counsel present. Status conference held and concluded. Case adjd to 10/4/76, at which time deft to appear with new counsel.

9/24/76 Stenographers transcript dated 9/22/76 filed.

9-27-76 Two transcripts filed, one dated 9-20 and one dated 9-21-76 filed.

10-4-76 Before PRATT, J.-Case called-Deft and counsel present-Case adjd to 10-28-76 at 9 AM for aclendar call.

10-28-76 Before Pratt, J.- Case Called. Counsel ^Present. Deft. not present. Trial to commence on 11-8-76 at 10:00 A.M.

11/1/76 Petition for Writ Of Habeas Corpus Ad Prosequendum returned and filed & executed.

11/8/76 Before ^{Pratt}PRATT, J. - Case called. Deft & Counsel present. Defts motion to dismiss. Motion argued. Motion denied. Defts motion for suppression. Suppression hearing ordered and begun. Motion to suppress argued and denied. Suppression hearing concluded. Trial ordered and begun. Jurors selected and sworn. Govt opens, deft opens. Trial continued on 11/9/76 at 9:30 a.m.

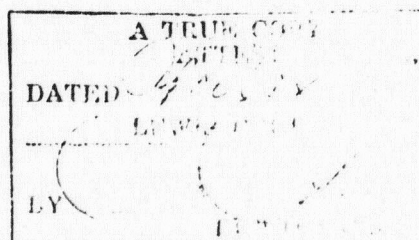
11-9-76 Before Pratt, J -case called - deft & counsel Howard Cerney present - trial resumed - trial contd to 11-10-76

11-10-76 Before Pratt, J.- Case Called. Deft. & Counsel present. Trial resumed. Govt rests. Deft's. motion to dismiss and for a mistrial argued and denied. Trial cont'd. to 11-11-76 at 9:30 A.M.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
11-12-76	(Document No.) Before Pratt, J.- Case Called. Deft. & Counsel present. Trial resumed. Jury returns from its deliberations at 11:30 A.M. with a verdict of guilty on counts one thru seven (7). Jury discharged. - Trial concluded. Bail continued. Motion to set aside verdict. Motion denied. Sentence adjd. without date.				
1-6-77	Before PRATT, J. - case called - deft & counsel present - deft sentenced for: Cts. 1,2,3,4,5,6 & 7 of 76 CR 268(S) - deft sentenced to imprisonment for a period of 4 yrs on ct.1, 4 yrs on cts 2 & 3 combined, 4yrs on cts. 4 & 5 combined, 4 yrs on cts 6 & 7 combined - each of the sentences on individual counts to run concurrently with each other - deft to serve a special Parole Term of 5 years - deft fined a total of \$10,000.00 - Stay of execution of sentence pending determination by the Court of Appeals. On motion of AUSA E. Thompson				
1-6-77	Judgment and commitment filed. Certified copies to Marshal, Probation and US Attorney.				
1-6-77	Notice of appeal filed. Docket entries and duplicate of notice of appeal mailed to the C of A.				
2-7-77	Scheduling Order filed received from the court of appeals that the record on appeal be docketed on or before 2-23-77				
3/30/77	Voucher for compensation for expert services filed.				
3/30/77	Stenographers transcript dtd 1/6/77, 11/8/76, 11/9/76, 11/10/76, 11/12/76, XXXXXX , 11/11/76 filed.				
4/22/77	Scheduling order received from the C of A that the record be docketed on or before May 13, 1977.				

underlying indictment 76CR268 is dismissed.

rk



1 with intent or the distribution, and they would
2 proceed with the conspiracy count if it then was
3 an issue of proof or the witnesses that were
4 available to them or vice versa. In this case,
5 where they have Lenny, who will testify for the
6 Government, I assume he's going to testify as to --
7 that he was the purchaser on the distribution.

8 Therefore, you don't have to get into the
9 hearsay testimony which would be admissible under
10 conspiracy and it would be my point of view that
11 this type of evidence that Mr. Gould is speaking
12 about, the tapes, which relate back, Judge, to
13 overt acts in 1974, which predate everything, that
14 those tapes would not be admissible on the grounds
15 they're not in furtherance of a conspiracy.

16 MR. GOULD: Your Honor, that's not the point.
17 The conspiracy-- The point is that they're admis-
18 sions as Hinton makes clear, certainly the references
19 back to prior drug dealings are as clear admissions
20 as you'll ever find.

21 The other statement about general negotiations
22 for further drug dealings are also admissions which
23 relate, certainly throw much probative evidence
24 on whether they dealt, whether DeMetrio's source
25 was in fact Mr. Rutolo in the past.

1 As for the usual method of proceeding on
2 just the conspiracy and dropping the other counts,
3 I don't know of a case in which anybody in our
4 office has ever done that. The substantive counts
5 under Pinkerton and that whole line of cases,
6 clearly can be proceeded on at the same time as
7 the conspiracy count. In fact, there can be an
8 acquittal on one, conspiracy on another.

9 We have three specific dates in the
10 substantive counts. Those are the dates on which
11 Mr. DeMetrio sold the drugs to the undercover agent,
12 Agent Garcia, and Mr. Rutolo is charged with aiding
13 and abetting in those sales. He aided and abetted
14 by supplying the drugs, in effect, in this case,
15 even supplied them on consignment. It's even a
16 heightened case of aiding and abetting.

17 The conspiracy involved the conspiracy
18 that took place over that time.

19 I told-- I laid out the case to Mr. Cerny.
20 We're going to get into the development of the con-
21 spiracy, how they met, how they started dealing
22 in small quantities, quarter ounces, and went
23 into the sales that eventually came with Agent
24 Garcia.

25 The tapes are not meant as overt acts. In

1 fact under the drug conspiracy, we don't have to
2 prove any overt acts. The tapes, in fact, are meant
3 as admissions to show that he knew that he is sitting
4 there talking about drugs with DeMetrio. If he
5 wasn't DeMetrio's source, it was awful strange.

6 In addition, he talks about the prior sales.
7 They are admissions to prove prior crimes, not
8 meant to be an overt act that we're proving at all.

9 MR. CERNY: We can discuss drugs (1) without
10 necessarily being a source or a sole source, drug.
11 The mere fact they're discussing drugs in and of
12 itself is not probative of the point Mr. Gould
13 makes.

14 MR. GOULD: That's an argument I'm sure
15 Mr. Cerny will make to the jury. It's a jury
16 question. I'm sure he'll argue to the jury it's
17 common practice for people to sit around and talk
18 about drugs and not deal in them. I'll make the
19 contrary. I believe that's a jury question.

20 MR. CERNY: The issue of the tapes and the
21 transcripts, Judge, is a very significant point
22 in this case, as Mr. Gould indicated his case would
23 envelope as he indicates now. Therefore I think from
24 the defense point of view I will need and take every
25 precaution to object to the admissibility and the

1 THE CLERK: United States of America versus
2 Carmine Rutolo.

3 MR. GOULD: Your Honor, I have a few pre-
4 liminary matters and I understand Mr. Cerny does,
5 too.

6 THE COURT: What are they?

7 MR. CERNY: Why don't you get yours over
8 first?

9 MR. GOULD: All right.

10 First of all, I want to put on the record
11 that we have made Frank Irace, Agent Levine, who
12 was there at the briefing, plus all the agents
13 on the surveillance team -- I told defense counsel
14 if he wished to meet with them I would make them
15 available.

16 Frank Irace is out of jail, not in our
17 control. I would produce him if they want him to
18 testify. At this time I don't believe we're
19 going to put Mr. Irace on, but I spoke to him
20 and requested that if defense counsel asked him
21 to testify that he would testify, and he told me
22 that he would.

23 In addition, we have tapes here, your Honor.
24 The courtroom will be wired up about lunchtime.
25 The way I plan to do it, unless Mr. Cerny would

1 like it some other way, which would also be fine
2 with me, is to play the tape completely through
3 rather than stopping it at each point to ask ques-
4 tions, and then come back and take the transcript
5 and ask the questions as to what the witness's
6 interpretation is after the tape is played through
7 completely. Rather than each line stopping and
8 having him explain the wording of that, we would
9 like to do it that way.

10 THE COURT: Do you have any objection to
11 that procedure?

12 MR. CERNY: I would say, your Honor, that
13 might be satisfactory. My only problem with that
14 is that it's cumulative in that you play it once,
15 go back over the same material again. You're get-
16 ting two different forms. However, from a practical
17 point of view, if it's going to be difficult for
18 the United States Attorney to stop the tape as
19 he's going along, then I will concede to it.

20 THE COURT: All right.

21 MR. CERNY: To the procedure he suggests.

22 This all presupposes the tapes are going
23 to be relevant, a foundation established for
24 admission.

25 MR. GOULD: Your Honor, the tapes have been

1 in defense's possession for literally five or
2 six months, although not Mr. Cerny's possession --
3 probably for a month or two.

4 We received no motion whatsoever that they
5 were-- They're clearly relevant, as he can see
6 from the transcripts. I don't at this point want
7 a challenge to the tapes. I certainly object to
8 making a hiatus in the trial when the tapes are
9 brought in at this point, when they've been in
10 the possession of the defendant for so long.

11 In addition, I would like to put on the
12 record I made a request many times to Mr. Cerny
13 if his view of the transcript was any different
14 from ours--and the tapes are fairly clear; I don't
15 think there should be a problem--we should be
16 notified about that, also.

17 I would like to make it clear we received
18 no notification. I assume the transcripts are
19 acceptable insofar as they accurately reflect
20 what's on the tapes.

21 THE COURT: Is there going to be an objec-
22 tion to the tapes?

23 MR. CERNY: As far as the relevancy is
24 concerned, your Honor, let me state this for the
25 record also as far as the period of time I've been

1 in the case: I've been in it, I believe, less than
2 a month.

3 Your Honor is well aware that at the time
4 I came in, the first time I appeared in this
5 courtroom, I informed the Court that I was also
6 engaged in other matters at that time and I would
7 ready myself as quickly as I can so the Court
8 would not be any further inconvenienced.

9 I understand the problem had been incurred
10 with prior counsel.

11 I also informed the Court of the diffi-
12 culties that I had in meeting with and obtaining
13 the material from my predecessor, and it has not
14 been an easy task.

15 As far as going over the tapes is concerned,
16 Judge, last Friday, or Thursday, I met with Mr.
17 Gould and Friday made a date to meet with the
18 agent on the tapes. Unfortunately, it was not
19 possible from the agent's point of view to get
20 together in the morning. We made a date; however
21 the tapes were made available to me last Friday
22 evening and the two tapes that I understand the
23 Government expects to use --

24 MR. GOULD: Three.

25 MR. CERNY: Is it three? Two of them are

1 originals and the other is a tape from--

2 MR. GOULD: I would like to make it clear
3 defense counsel did have the tapes for months.
4 What he was talking about is the originals, which
5 sound exactly like the copies. He did not first
6 get the tapes last Friday. He asked to see the
7 originals. We arranged immediately for him to
8 hear the originals. We, of course, played copies
9 of the tapes, the three tapes we plan to use for
10 the witness, and he initialed them because,
11 obviously, he has to identify them. Look at the
12 tape, say, "Yes, that was accurate," before it's
13 played. It comes into evidence before it's
14 played, and he initialed the three copies we planned
15 to use.

16 There's no difference in audibility. They
17 are clear tapes. Defense counsel did have the
18 copies and transcripts from months ago. What he's
19 talking about is just listening to the originals,
20 which, of course, we said was fine. "If you want to
21 play the originals. There's no difference in the
22 two."

23 MR. CERNY: Also, Judge, there are some
24 gaps in the tapes, so forth, which are unexplained,
25 but what I'm driving at primarily, Judge, is this:

1 Here we have a conspiracy count, the first count,
2 and then we have possession with intent to dis-
3 tribute, and then we have three counts of
4 distribution. I do not know what or who the
5 witnesses will be or the order of the witnesses
6 and insofar as the relevancy of these tapes,
7 I think, as to whether there's going to be objec-
8 tion to it, I think it's going to depend upon who
9 the Government's witnesses are going to be.

10 As I understand, the Government is proceed-
11 ing on all seven counts; is that correct?

12 MR. GOULD: The Government also informed
13 Mr. Cerny who the witnesses would be: Leonard
14 DeMetrio and Agent Garcia. Leonard DeMetrio, as
15 we've discussed and is evident from the tapes,
16 Leonard DeMetrio will testify as to the meanings
17 of the words on the tapes, the circumstances behind
18 making the tapes, and as a matter of fact, one
19 tape that is not on the telephone, I sat down
20 with Mr. Cerny and told him they were in a car
21 and explained the circumstances of how that par-
22 ticular tape was made, that they went into a car,
23 went someplace to eat, came back to the car, etc, etc.

24 I have told him those are our witnesses.
25 In fact, I told him on Thursday we didn't plan

1 calling Frank Irace on direct, at least.

2 MR. CERNY: That's a correct statement,
3 Judge. The point I was making, though, is this:
4 If I were to assume the purpose of the tapes
5 will be for the purpose of proving Count One--
6 Is that correct?

7 MR. GOULD: Will be for the purpose of
8 proving all the counts, the tapes, No. 1, make
9 reference to the prior dealings in all the counts
10 and the conspiracy.

11 In addition, as is clear in the recent case
12 of United States v. Barbara Hinton, decided
13 September 27, 1976, Slip 5679, the references on
14 the tape to general drug dealing are clearly
15 relevant as admissions, as the court states in
16 this situation to the prior dealings, also.

17 There are statements in there, first, our
18 tapes have two types of statement: one group
19 inculpable because they refer back to the
20 previous drug transaction, clearly, directly in
21 point, and the other series of transactions talk
22 about negotiations of a drug transaction that was
23 supposed to take place after our co-conspirator was
24 arrested.

25 In this Hinton case, which they were talking

1 about tapes that a defendant made in a police
2 station -- not even to a witness -- but in a
3 police station, and there were statements like
4 "You might think I'm a bad guy because I deal in
5 drugs. I've sold drugs," or, "When you're in
6 drugs, I don't mean no street corner pusher,
7 you've got a network of some information."

8 The court, Second Circuit, said those were
9 relevant to Cameron's knowledge and intent
10 and culpability with reference to the criminal
11 charge.

12 The jury could reasonably infer the business
13 he spoke of was narcotics and the statement was of
14 particular relevance inasmuch as there's been
15 earlier testimony relating to these things.

16 Clearly, then, the tapes are relevant,
17 certainly the portions relating to the prior
18 transactions and the general negotiation about
19 drugs shows guilty knowledge and as the court
20 stated in this Hinton case, they didn't even have
21 to say there were subsequent similar acts, their
22 admissions about dealing in drugs, dealing in drugs
23 with Lenny DeMetrio, therefore are probative as
24 evidence as the Government could ever hope to get,
25 which is precisely why the Government intends to

1 play the tapes.

2 THE COURT: Mr. Gould, what was that Slip
3 number for Hinton? I remember reading the
4 decision. I would like to re-read it.

5 MR. GOULD: U.S. v. Hinton, 5679, September
6 27, 1976. Your Honor, I would refer you to around
7 page 5707, because it's a very long opinion with
8 many issues in it. The tape issue comes around
9 5707; I believe.

10 In addition, I have other cases on the
11 matter, if need be, but I think the point is so
12 obvious that it doesn't-- Unless your Honor feels
13 you need further law, I do have other cases.

14 MR. CERNY: What troubles me in that area,
15 of course, from a defense point of view, when you
16 see an indictment like this, where you have the
17 first count as a conspiracy count, and then you
18 have three counts of possession with intent to
19 distribute, and then three counts with distribu-
20 tion, of course the first thought that comes to
21 your mind, Is the indictment set up in this fashion
22 because of the type of witnesses that are going
23 to testify? Because normally, from my experience,
24 you would find that the Government would not be
25 proceeding with the last six counts, possess

1 with intent or the distribution, and they would
2 proceed with the conspiracy count if it then was
3 an issue of proof or the witnesses that were
4 available to them or vice versa. In this case,
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16 question. I'm sure he'll argue to the jury it's
17 common practice for people to sit around and talk
18 about drugs and not deal in them. I'll make the
19 contrary. I believe that's a jury question.

20 MR. CERNY: The issue of the tapes and the
21 transcripts, Judge, is a very significant point
22 in this case, as Mr. Gould indicated his case would
23 envelope as he indicates now. Therefore I think from
24 the defense point of view I will need and take every
25 precaution to object to the admissibility and the

1 use of the tapes against the defendant.

2 THE COURT: Certainly, you're entitled to
3 do so. I'm concerned about problems which may
4 arise during the course of the trial and having the
5 jury step out when we have extended arguments over
6 matters which perhaps we can dispose of at this
7 point.

8 MR. CERNY: I'm wondering this. Again, to
9 a limited extent, I guess I'm apologizing to the
10 Court that I'm just not a little better briefed
11 and prepared. I would normally have points like
12 this briefed to present my position in writing to
13 your Honor. Time just did not allow it.

14 Also, from the fact point of view, although
15 I know there was the previous conference required
16 under the Rules with Mr. Gould that Miss Rosner
17 had. Unfortunately, Miss Rosner had nothing in
18 writing regarding this conference. I did meet
19 with her on a single occasion in court and tried
20 to obtain from her as much as I could, Judge, but
21 again she was wrapped up in the trial of the case
22 and so it was not easy -- and I did not obtain
23 anything frankly that was helpful to me.

24 Also, the transcripts, Judge, another point
25 is that on the transcripts-- There are transcripts

1 more than what the Government intends to use. Not
2 all those transcripts have dates, so I've had
3 difficulty datewise on those transcripts, also.

4 MR. GOULD: Your Honor, I would like to
5 point out in U.S. v. Joseph Mauro, decided November
6 25, 1974, I have the slip, I don't have the F. 2d
7 cite, 483, that a motion to suppress would be
8 untimely during the trial. To begin with, the
9 Government has the right to appeal suppressed evi-
10 dence and the reason that I assume they are made
11 early, ten days after -- usually ten days for
12 motions, is that the Government, if it's suppressed
13 during the trial, the Government has no appellate
14 right. That's precisely why the rules are made
15 the way they are, the emphasis it has to be before
16 trial.

17 No. 1, we're effectively blocked from right
18 of appeal.

19 No. 2, it disrupts the trial because it's
20 an advantage to make an uneven and rough trial.

21 In fact, I think at this point the motion
22 would be late, but I would have -- I would
23 reluctantly agree to settle the issues now, but
24 I certainly would object vigorously to it happening
25 during the trial. It would negate our right to an

1 appeal. It would violate the federal rules, violate
2 U.S. v. Mauro.

3 THE COURT: I haven't understood Mr. Cerny
4 to talk about things that would call for suppression.
5 So far he's talked about relevancy and I don't think
6 that the motion to suppress is one which goes as much
7 to relevancy as it does to the manner in which
8 evidence has been obtained. A motion to suppress
9 almost assumes the relevancy of the material you're
10 talking about.

11 MR. GOULD: Your Honor, in view of the fact
12 that there's not even been appeals on similar acts,
13 the Government being denied to bring similar acts,
14 suppression applies to anything that the Government
15 finds out it can't use.

16 As to relevancy, it's a simple case.
17 I don't mean it's going to be simple for the jury
18 to decide, but I mean it's a simple case as to
19 what happened. I'm perfectly prepared to argue the
20 relevancy issue. I'm not at all worried about that.
21 I'm just stating that I don't think that it's
22 proper under the rules to do it during the trial.
23 It's proper, perhaps, weeks ago or months ago.

24 Even at this late date that the Government
25 having given so much time to defense counsel --

1 it's not Mr. Cerny's fault, clearly, but it's not
2 our fault either -- these are things that can
3 be decided now. There's no reason they can't be.

4 THE COURT: Are there issues about the
5 tapes other than the question of relevancy,
6 Mr. Cerny?

7 MR. CERNY: Judge, of course, as I under-
8 stand, the tapes stem from two sources: one, they
9 stem from-- these are consensual recordings, Judge,
10 the first series or group, as I understand it,
11 stem from Agent Garcia, and the second group
12 would stem, of course, from Lenny; is that
13 correct, Mr. Gould?

14 MR. GOULD: We've turned over all the tapes,
15 your Honor, but the Government plans to use the
16 tapes that stem from Lenny unless, possibly, on
17 redirect as prior consistent statements, we
18 may use the other tapes. I don't know.

19 In any case, on our direct case we're using
20 the ones that stem from Lenny.

21 There are also tapes in which Mr. Garcia
22 tapes Lenny and Frankie, and they're turned over.

23 THE COURT: They're all consensual tapes?

24 MR. CERNY: As I understand it, Judge.
25 Mrs. Rosner did tell me she did inquire during the

1 conference with Mr. Gould as to whether or not
2 there was any wiretapping and/or bugging.

3 THE COURT: He stated on the record there
4 was not.

5 MR. CERNY: There was stated on the record
6 there was not.

7 MR. GOULD: That's correct.

8 MR. CERNY: Therefore I deduced it was all
9 consensual.

10 Insofar as that's concerned, as I understand
11 it, the first consensual recordings commenced in
12 about 1974, Judge, which is the period of time that
13 they claim that our client sold to the agent or
14 sold to Lenny and several months thereafter Lenny
15 sells to the agent and at that time, as I understand
16 it, the agent is recording Lenny, and then there
17 is a period of several months and Lenny then is
18 arrested, and when Lenny is arrested, as I under-
19 stand it, Lenny indicated that he would cooperate
20 with the Government, and then at that moment, as
21 I understand, Lenny then starts to record--

22 THE COURT: What he recorded are the tapes
23 we're concerned with?

24 MR. GOULD: Yes.

25 MR. CERNY: Yes, the first three tapes the

1 Government indicated they would offer in evidence.

2 THE COURT: There's no question as to the
3 authenticity of the tapes, no question they've been
4 phonied up or doctored in any way, is there?

5 MR. CERNY: Of course, there's something
6 I could not answer. I don't know. This is a man
7 who has been arrested, who obviously is trying to
8 protect his own hide as much as he can; therefore
9 obviously he wants to do as much as he can to
10 prove himself and to do well for the Government.

11 THE COURT: I realize that. If there's
12 going to be an objection on that ground, it should
13 be heard before the trial starts.

14 MR. CERNY: You ask me a question. Are
15 these legitimate tapes? Did Lenny in any way
16 manipulate them or reduce them to take out the
17 bad stuff, leave the good stuff? I'd have no
18 way of knowing, Judge. I just don't know.

19 THE COURT: Insofar as you now stand, you
20 are not making any application in that connection?

21 MR. CERNY: I'm not making any application
22 in that regard, Judge; however, it seems to me
23 that it's encompassed in the whole as to what
24 extent Ms. Rosner, again, went into this. I don't
25 know. I tried to find out. Her recollection on

1 this point was not real good. She said that she
2 made an omnibus motion and when the motion was
3 returnable she met with Mr. Gould; that there were
4 some points she recalled it, which required clari-
5 fication, but her recollection was that those
6 points had in fact been clarified.

7 I thereupon asked her whether she made any
8 motion to suppress, and I at that time, which was
9 just soon after I had been retained, I asked her
10 whether or not she made or considered a motion to
11 suppress the oral statement, apparently made by the
12 defendant at the time he was in custody after he
13 was arrested, Judge.

14 Her recollection at that time was that she
15 did not certainly make a written motion and
16 I don't think she was clear, Judge, as to what
17 transpired in the discussions with Mr. Gould on
18 that point.

19 That's another point, but there is this
20 statement purportedly, we're told, made while he
21 was in custody and the question as to whether or
22 not he had been advised of his constitutional
23 rights. That certainly is an appropriate matter
24 for suppression or motion to suppress if the
25 Government intends to use it.

1 MR. GOULD: Clearly, the Government intends
2 to use it, but the agent's report which describes
3 what went on at that time has been in defendant's
4 possession for over four months now. It's been--
5 Whether or not Miss Rosner made the motions --
6 and I don't know if she made motions to suppress,
7 Mr. Cerny has been in the case since the 4th of
8 October, according to my file, and he had the
9 sheet that stated the statement. That's the first
10 thing I gave to Ms. Rosner, which said Mr. Rutolo
11 made statements and here's what they were.

12 Obviously we're going to use the state-
13 ments incriminating.

14 Again, it comes late, but if it's going
15 to be done, let's do it now. I'll put Agent
16 Garcia on the stand. He was there through the
17 whole thing. I even told Mr. Cerny that the other
18 agent, Levine, would have been available as well
19 as any agents on surveillance; the surveillance
20 agents being listed on the sheet.

21 At this point, again it's awfully late, but
22 if we have to, I'll put Agent Garcia on the stand
23 now, go through the agent. If those statements
24 were to be suppressed, obviously the Government
25 would have to consider whether it would want to

1 appeal. I know it would be a great inconvenience
2 to delay the trial for an appeal at this point,
3 should the statement be suppressed. That's why
4 it's usually preferable to do these things earlier.

5 MR. CERNY: Another point that concerns
6 me just a little bit is the offer by the Government
7 to make witnesses available or purported witnesses
8 available, like making Mr. Irace and Mr. Levine
9 and the other agents who were involved in this
10 matter.

11 Frankly, I guess I don't know what that
12 means. As I understand, Mr. Irace is a co-
13 conspirator in this case, has been arrested on
14 another charge. What his status is I don't know.

15 Agent Levine, as I understand, was the
16 supervising agent at the time Mr. Rutolo was
17 brought into DEA Headquarters. The other agents,
18 of course, were on the surveillance.

19 I guess what I'm saying, Judge, if there is
20 something of an exculpatory nature that these men
21 would have, Mr. Irace, Mr. Levine, or any other
22 agents, then I would like that it would be identi-
23 fied and I would ask for its production in another
24 form instead of just stating the agents are avail-
25 able to me, just saying the agents are available

1 to me, I frankly don't know what that means
2 although I do appreciate the offer.

3 MR. GOULD: Let me state two things that
4 it means: One I think the cases on Brady make
5 clear. I have not spoken to most of these agents.
6 There may be a surveillance agent. I haven't spoken
7 to any of them who would say, "I was with Carmine
8 Rutolo playing cards." It's available to defense
9 counsel. It's clear if it's his job to do it.

10 Let me tell you quite frankly, and there
11 is my main motivation: If Mr. Cerny says why didn't
12 the Government call X, I'm going to say, "Here's
13 X. If you want to call him, call him."

14 I've spoken to Frank Irace. I would love
15 to have him called by Mr. Cerny. He can speak to
16 Mr. Irace. Obviously, Irace's statement on every
17 detail isn't the same. I will state quite clearly
18 he states Rutolo was the source on all three of
19 those dates. If he wants to call Mr. Irace, fine,
20 Levine, fine. Interview them. Whatever may be
21 Brady material there, we're making them available.
22 It's not our job to do it. My main motivation--

23 THE COURT: Mr. Gould, if you're aware of
24 any exculpatory material you have obligation to
25 bring it to the attention of defense counsel.

1 MR. GOULD: Your Honor, the latest case
2 that came down, Agar -- and we're far beyond that --
3 the Agar case, saying the general statement if it
4 gives exculpatory material without specific things.

5 If I, for one minute, had somebody come in,
6 say, Carmine Rutolo was innocent, I would pre-
7 sent it to him.

8 All I'm saying is that when we make things
9 available to him, it's his job to go out there
10 and do it. I assume if you get four surveillance
11 agents together, they're going to have different
12 views of things. There were, I don't know how many
13 agents at the statements. There were two that have
14 signed the report. There are others that are there.

15 He can talk to them. If he wants to inter-
16 view them, it's fine with me.

17 I don't know what he would consider exculpa-
18 tory. Frank Irace, on some details, has a differ-
19 ent recollection than Lenny. Nothing major. Not
20 on the important details. Obviously, the Government,
21 the reason I'm not putting Frank Irace on, I never
22 like to put on two witnesses when one will do just
23 as well.

24 Mr. DeMetrio was there all the time.

25 'I believe I'm discharging this obligation

1 when I'm making all the people available for him
2 to interview them.

3 MR. CERNY: I would ask again, call for the
4 exculpatory material in a different form other
5 than saying that people are available to me to
6 interview, because, again, here you have Frank
7 Irace, who was arrested by the United States
8 Attorney. He has another charge pending or
9 resolved. He, as I understand it, has agreed to
10 cooperate with the Government.

11 If I go to interview him, Judge, you can
12 appreciate that I wouldn't expect to have someone
13 that would be very receptive to me. Therefore,
14 I think if the exculpatory material does exist,
15 that I should be given it in the customary form of
16 Brady.

17 THE COURT: Mr. Cerny, if there is exculpa-
18 tory material of which Mr. Gould is aware, he must
19 give it to you.

20 MR. CERNY: Yes, sir.

21 THE COURT: Think what he is saying in a
22 roundabout way is he has prepared his case. He is
23 aware that other people may know something about
24 this that he has not found necessary to go into
25 for purposes of preparing his case.

1 If there is gold to be found in these other
2 mines, it's not his problem to dig it out,
3 particularly when he had no reason to believe it's
4 there. You never know what you find sometimes
5 when you interview witnesses.

6 MR. GOULD: I would like to make it clear
7 for the record as to two particular points.

8 One, the interviewing of Mr. Rutolo, I have
9 long spoken to two agents involved, Levine and
10 Skippy. Agent Garcia was in and out of the room.
11 There, statements as to what happened while they
12 were in the room, when particular things are said,
13 much like Frank Irace, he don't remember. "Was Skippy
14 there when you said that?" "I'm not positive."

15 Agent Levine? "I'm not positive."

16 Agent Levine remembers him being a little
17 more belligerent, does not remember, do not know
18 if he was there for a statement, one of the state-
19 ments of, I believe it was, "I know you did it,
20 but you can't prove it."

21 Agent Levine says he remembers Rutolo
22 constantly saying, "You can't prove nothing on me."

23 Agent Garcia remembers him saying that once
24 or twice, does not remember him repeating it as
25 often as Agent Levine does.

1 This is the kind of thing. People were
2 in and out of the room.

3 Same thing with Frankie Irace. Frank Irace
4 would say, "Gee, I don't know if I was at the car."

5 Lenny would say, "I was standing behind."

6 That's the characterization of the thing I'm
7 talking about, the thing I spoke about.

8 THE COURT: I understand.

9 MR. CERNY: Insofar as the people are
10 concerned, however, I think Frank Irace holds a
11 little different position here than anybody else
12 inasmuch as he's a co-conspirator named in the
13 indictment. Therefore, if any of his material, if
14 that's the right word, would be of an exculpatory
15 nature, I think the Government would be more likely
16 to know it and especially if that material which
17 would be inconsistent with what Lenny, who is also
18 a co-conspirator, Judge, would have. I think--

19 MR. GOULD: What I'm saying, your Honor,
20 is I don't know what he would consider exculpa-
21 tory, helpful to his case. I think Frank Irace
22 on the stand is going to help us more than hurt
23 us. I say "Here, you look through it. Decide
24 what's Brady." Frank Irace can do what he wants.
25 He's not under our control.

1 I asked him, "If defense counsel contacts you,
2 would you talk to him and if he asked you to testify?"

3 "Yes."

4 Let Mr. Cerny decide whether he thinks Frank
5 Irace is helpful to him or not. It's not up to me
6 to decide what's helpful to his case. Let him
7 talk to whoever he wants to put on who's helpful.
8 I'm not hiding anything. I'll get ahold of anybody
9 he wants me to get ahold of.

10 MR. CERNY: As a realistic point, as you
11 remember in private practice, that defense counsel
12 going to talk to Frank Irace under the circumstances
13 which Frank finds himself, and under the offer to
14 be helpful and cooperate with the Government,
15 what kind of reception could anyone realistically
16 expect from this gentleman?

17 MR. GOULD: Try.

18 THE COURT: Mr. Cerny, you've asked a lot
19 of questions. You've expressed a lot of doubts,
20 but you haven't asked me to do anything in par-
21 ticular.

22 MR. CERNY: Right. What I'm asking for,
23 precisely, is I would ask for, again, under Brady
24 v. Maryland, matters of exculpatory nature that
25 I'm entitled to. I would certainly say--

1 THE COURT: As to that, the Government says
2 they've given it to you.

3 MR. GOULD: I rest on the record on that,
4 your Honor.

5 MR. CERNY: Then I would then ask, Judge,
6 any material that Frank Irace has either given or
7 whatever his position is, inconsistent with Lenny,
8 who I understand will testify.

9 MR. GOULD: That's clearly, your Honor,
10 Irace is available for him to be called.

11 THE COURT: You do, I assume, have state-
12 ments of some sort from Irace?

13 MR. GOULD: I'm looking to see if I took notes
14 with my meeting with Frank Irace. I stated the
15 nature of the inconsistencies, no inconsistencies
16 as to the source or anything like that.

17 THE COURT: You're talking about details?

18 MR. GOULD: Yes, I'm talking about two
19 years ago they remember things. In addition, your
20 Honor, both Irace and DeMetrio were debriefed on
21 tape and those tapes are in the defendant's
22 possession.

23 I probably didn't ask him about some details
24 that might be inconsistent. I'm trying to look to
25 see if I have anything.

1 I would like to put on the record I object
2 to this whole procedure. So long as we're not
3 doing anything to tell Irace not to cooperate,
4 we're doing in fact the opposite. We'll make him
5 available.

6 I don't see what other obligation we have.

7 MR. CERNY: I don't know where the guy is at.

8 MR. GOULD: I'll find him, bring him in, as
9 I told you. I can't force him, but he said he would
10 come in.

11 THE COURT: Mr. Gould, you don't know, for
12 sure, what a witness is going to say when he takes
13 the witness stand until he takes the witness stand.
14 It may well turn out that DeMetrio does not testify
15 quite as you expect him to, in which case there may
16 be some major inconsistencies between what he says
17 and what Irace might be expected to say based upon
18 your knowledge.

19 If that is the case, I think it would impose
20 upon you a duty, even at that time, to disclose to
21 defense counsel the information which you have.

22 MR. GOULD: Your Honor, I think what the
23 Courts have clearly tried to get away from, and
24 Agar and all the other cases made clear, is that
25 I'm stating, right for the record, if Leonard

1 DeMetrio gets up, says, "I was driving to the
2 spot," and says, "Frankie drove to the spot" maybe
3 that's an inconsistency Frankie Irace said. There
4 may be eight million inconsistencies that I don't
5 remember. I took notes once with Frank Irace,
6 and very briefly, and--

7 THE COURT: Do you say there is a taped
8 interview with Irace?

9 MR. GOULD: Right after he was arrested,
10 debriefed before Lenny DeMetrio was showing up,
11 states the source, what he does about Carmine, things
12 like that.

13 THE COURT: It does not appear to me at
14 the moment there is anything further the Government
15 is required to do.

16 MR. CERNY: Of an exculpatory nature, Judge?

17 Might I ask this, your Honor: 13A, Form 13A,
18 which is referred to, I think, in Agent Garcia's
19 report, I don't recall, is that a form that the
20 defendant is required to sign?

21 MR. GOULD: Miranda warnings?

22 MR. CERNY: Right.

23 MR. GOULD: He's not required to sign any-
24 thing.

25 AGENT GARCIA: Just a form that has the

1 warnings which are read to the defendant on arrest.

2 MR. CERNY: Form 13-A, it's then not a
3 form which is signed by anybody, the defendant or
4 anybody else.

5 THE COURT: Sometimes agents try to get the
6 person to sign it to acknowledge that they have had
7 it read to them or they have read it and they under-
8 stand.

9 MR. CERNY: Yes.

10 THE COURT: Whether that was done in this case
11 or not, I don't know.

12 MR. GOULD: It's clear from the sheet, after
13 questioning a while, Mr. Rutolo, all the agents
14 were in there -- the two I spoke to -- both agreed
15 he didn't want to talk any more and they didn't -- he
16 didn't sign anything, no signed waiver of rights
17 form, no signed statements.

18 MR. CERNY: In view of that, Judge, it would
19 seem to me that the issue as to the statement made
20 by, purportedly made by Rutolo, which is contained
21 in Agent Garcia's report, would properly be subject
22 matter of a motion to suppress. I'm just wondering
23 how or whether this was discussed with Ms. Rosner
24 or what.

25 THE COURT: I think we'd better forget about

1 Ms. Rosner and try the case as we have it presented
2 to us.

3 MR. CERNY: I can't ask for something that's
4 been done before.

5 THE COURT: There has been no motion to
6 suppress made part of the record. It was talked
7 about possibly maybe somebody might want to make
8 a motion to suppress sometime, but no motion has
9 been made.

10 MR. CERNY: I see.

11 THE COURT: If you wish to make such a motion
12 you're untimely, but if you want to have a suppres-
13 sion hearing, we'll put the witnesses on the stand
14 right now before we get the jury up, find out
15 whether the statements are going into evidence or
16 not.

17 If you want to do that, fine. Your client
18 has a right to testify. It can't be used against
19 him except for impeachment purposes.

20 MR. CERNY: Can we just go down the rest of
21 the things and I will inform you at the conclusion
22 of this.

23 I'm wondering whether the agents made any
24 notes or whether they have any notebooks which they
25 maintained on this case which led up to the reports

1 What is the case about? As you've heard, it's
2 a drug case. It's a heroin case. It's a case about
3 a heroin supplier. Let me start by giving you a
4 little background of this case. Back about two years
5 ago, in 1974 and '75, two young men whose names you've
6 already heard, Leonard De Metrio and Frank Irace sold
7 some heroin to an Agent Garcia. Now, at the time,
8 needless to say, they didn't know that Agent Garcia was
9 working for the Federal Government because he was
10 working in an undercover capacity. But, they sold
11 him heroin on three different occasions. Once on
12 August 5th of 1974, one about a month later on Septem-
13 ber 9th of 1974 and again about six months after that
14 on March 10th, of 1975.

15 Now, as you will learn, these two young men,
16 Leonard De Metrio and Frank Irace, were the middlemen.
17 In this case the Government is prosecuting their
18 supplier, the defendant, Carmine Rutolo.

19 The Government will prove that Carmine Rutolo
20 was the source of all of the heroin that was sold to
21 Agent Garcia on those three occasions through Leonard
22 De Metrio and Frank Irace. I'd like to speak to you
23 for just one moment about the Indictment in this case.

24 As Judge Pratt indicated, the Indictment sets
25 forth the charges against the Defendant and at the end

1 of the trial Judge Pratt will instruct you at length
2 on the elements of the various charges or crimes. At
3 this point, I just would like to make one very brief
4 explanatory comment. You will note that most of the
5 counts in the Indictment charge a crime of possession
6 or distribution of heroin on the dates that Leonard
7 De Metrio and Frank Irace sold heroin to Agent Garcia.
8 Now, the reason that the Indictment mentions these
9 dates is because the Defendant is charged with aiding
10 and abetting in those sales.

11 The Government does not have to prove and will
12 not prove that the Defendant was personally present
13 at that time, and in fact you will hear he was not
14 present at that time. But, the Government will prove
15 that the Defendant aided and abetted in those sales,
16 because the Government will prove he was the source
17 of all of the heroin that was sold to Agent Garcia on
18 those three occasions.

19 There is an additional count in the Indictment
20 which is a conspiracy count; a conspiracy in essence
21 is a criminal partnership or a criminal agreement.
22 It's the first count of the Indictment and it charges
23 that from on or about August, 1974, that was the first
24 time that Leonard De Metrio and Frank Irace sold
25 heroin to Agent Garcia, lasting atleast until March 10th,

1 1975, which was the time of the third sale.

2 The Defendant, Carmine Rutolo, did knowingly
3 and wilfully conspire with Frank Irace and Leonard
4 DeMetrio and others to possess and distribute heroin.
5 And as I said at the end of the trial Judge Pratt will
6 instruct you in detail what the elements of a con-
7 spiracy are.

8 Well, how will the Government prove its case?
9 First, you're going to hear the testimony of a
10 Chemist, an expert witness. And you're going to learn
11 from him that all of the substances that were sold to
12 Agent Garcia on those three occasions were indeed
13 heroin and you're going to see the heroin. You will
14 hear from Leonard De Metrio and you will hear from
15 him that all of the heroin that was sold to Agent
16 Garcia came from the Defendant Carmine Rutolo.

17 Now, you will hear from Leonard De Metrio that
18 he and the Defendant have known each other for about
19 four years. They first met, I think, it was back in
20 1972 when they worked together at Western Union
21 International at 26 Broadway, and you'll be hearing
22 that address during the trial.

23 You'll hear that some time they socialized
24 and they became friends and you will hear that Leonard
25 De Metrio bought heroin from the Defendant and when you

hydrochloride, a Schedule I narcotic drug controlled substance.

Count 4 charges that on or about the 9th day of September 1974, within the Eastern District of New York, the defendant Carmine Rotolo, did knowingly or intentionally possess with intent to distribute a quantity of heroin hydrochloride, a Schedule I narcotic drug controlled substance.

Count 5 charges that on or about the 9th day of September 1974, within the Eastern District of New York, the defendant Carmine Rotolo, did knowingly or intentionally distribute a quantity of heroin hydrochloride, a Schedule I narcotic drug controlled substance.

Count 6 charges that on or about the 10th day of March 1975, within the Eastern District of New York, the defendant Carmine Rotolo, did knowingly or intentionally possess with intent to distribute a quantity of heroin hydrochloride, a Schedule I narcotic drug controlled substance.

Count 7 charges that on or about the 10th day of March 1975, within the Eastern District of New York, the defendant Carmine Rotolo, did knowingly or intentionally distribute a quantity of heroin hydrochloride, a Schedule I narcotic drug controlled substance.

Counts 2, 4, and 6 of the indictment charge the defendant with knowingly or intentionally possessing heroin with intent to distribute it. In order to establish that defendant is guilty as charged in either count 2, 4, or 6, the Government must prove beyond a reasonable doubt four essential elements:

1. That, at the time and place charged by the count, the defendant possessed a quantity of heroin;

2. That at that time the defendant knew that he was in possession of heroin;

3. That his possession of the heroin was voluntary and intentional; and

4. That, at the time of his possession of the heroin, the defendant intended to distribute it to another person or, in other words, that at that time he intended to deliver it to another person.

Only if the Government has established beyond a reasonable doubt all four of these essential elements with respect to count 2, 4, or 6, may you convict the defendant on that particular count. Or, in other words, you must acquit the defendant on any of these counts as to which the Government has failed to prove beyond a reasonable doubt one or more of the four essential elements that I have just described.

Counts 3, 5 and 7 of the indictment charge the defendant with knowingly or intentionally distributing heroin. In order to establish that the defendant is guilty as charged in either count 3, 5, or 7, the Government must prove beyond a reasonable doubt three essential elements:

1. That at the time and place charged by the count, the defendant distributed heroin to another person -- in other words, that at the time and place charged, he delivered the heroin to another person.

2. That at that time the defendant knew he was distributing heroin; and

3. That he distributed the heroin voluntarily and intentionally.

Only if the Government has established beyond a reasonable doubt all three of these essential elements with respect to count 3, 5, or 7, may you convict the defendant on that particular count. Or, in other words, you must acquit the defendant on any of these counts as to which the Government has failed to prove beyond a reasonable doubt one or more of the three essential elements that I have just described.

The fact that one element of a crime may or may not exist has no bearing upon any other element of that

crime.

You may not infer solely from the existence of one element of a crime, if you conclude that the element has been established, the existence of any other element of the crime.

If any element of the crime has not been established beyond a reasonable doubt, your verdict must be not guilty. On the other hand, you must convict the defendant of a crime charged if each of the elements of that crime has been proved beyond a reasonable doubt.

Now, there is one variation to what I have just described to you with respect to the essential elements of the counts of this indictment. That involves counts 2, 3 and 7. That is the question of aiding and (sic) abetting.

As part of the charges in this case, the defendant is charged with having aided or abetted in the commission of the acts described in counts 2, 3 and 7.

Section 2 of Title 18 of the United States Code says in part that whoever...aids or abets the commission of an offense is punishable as if he committed the offense himself. Thus, if you find beyond a reasonable doubt that someone other than the defendant committed an

1 charged in count 2, 3, 4, 5, 6 or 7, and that
2 defendant aided or abetted the commission of the
3 offense, you may find the defendant guilty of the
4 count charging that offense, even if the defendant did
5 not commit the offense himself. But, to find that
6 the defendant aided or abetted the commission of an
7 offense charged in one of these counts, you must
8 conclude beyond a reasonable doubt that another
9 person has committed the offense, a conclusion that
10 requires a finding that the Government has proved
11 beyond a reasonable doubt each of the essential
12 elements of the offense with respect to the other
13 person, and that the defendant in some way wilfully
14 associated himself with the other person's criminal
15 venture, that he participated in it wilfully, as in
16 something he wished to bring about, and that he
17 wilfully sought by his action to make the criminal
18 efforts of the other person succeed.

19
20 I have used the word "wilfully." An act is
21 "wilfully" done, if done voluntarily and intentionally
22 and with the specific intent to do something the law
23 forbids -- that is to say, with bad purpose to dis-
24 obey or disregard the law.

25 Mere knowledge that a crime is being committed

Government in connection with his cooperation or testimony, there is no claim by the defendant that that money was paid illegally or improperly by the Government. The point being made is that that payment of the money to the witness, you may weigh along with all the other circumstances in determining the witness' motive, state of mind, any reason he might have to falsify his testimony before you. In other words, that along with the other circumstances in the case are things which you should weigh in determining the credibility of Mr. DeMetrio.

And the last point I would like to clarify for you is with respect to the Government's theory of this case on the substantive counts; in particular, with respect to dates. We have three dates which are charged in the indictment. I should have memorized them by now but it's August --

MR. CERNY: August 5, your Honor.

THE COURT: August 5, 1974, September 9, 1974 and March 10, 1975. Now, according to the testimony, these are the dates of the sales by DeMetrio and Irace to Agent Garcia. On counts 2 through 7, which are made against the defendant, they are made against the defendant with respect to those dates on

1
2 the theory that the defendant aided and abetted
3 DeMetrio and Irace in making those sales and his
4 aiding and abetting them was by supplying them with
5 the heroin which was the subject of the sales.

6 Now, in supplying the heroin for the first two
7 sales, according to the testimony, occurred prior to
8 August 5, 1974. The Government's theory of the case
9 is that earlier supplying of them aided and abetted the
10 two sales that occurred on August 5, 1974 and
11 September 9, 1974, and that is the reason they have
12 made the charges against the defendant, tied to those
13 particular dates.

14 All right.

15 Now, I told you at the beginning of the trial
16 that one of your number would be designated an
17 alternate juror before you retired for deliberations.
18 That time has now come and Juror No. 10, Joyce Curry
19 has been designated as the alternate juror. So you,
20 Miss Curry, will be excused as soon as I indicate to
21 the other jurors that they are to retire and commence
22 their deliberations. Will you please swear in the
23 Marshals?

24 (Thereupon, the Marshals were duly sworn by
25 the Clerk of the Court.)

1
2 THE COURT: Ladies and gentlemen, without any
3 favor to any man, you will try the issues between
4 these parties according to the evidence given you in
5 this court and the laws of the United States. You
6 may now retire to the jury room and commence your
7 deliberations.

8 (Time noted: 3:30 p.m.)

9 (Thereupon, the jury left the courtroom.)

10 MR. GOULD: Your Honor, could I have one moment?

11 I just spoke to Mr. Cerny about this and just to
12 clarify the record and display that my boss, who is
13 also my secretary knows a lot more than I do.
14 Leonard DeMetrio was sent one day's \$20 fee for
15 coming in last summer before going to jail. He came
16 in once and Frankie Irace came in to see me. He
17 hasn't been paid any fee. I am holding in my hand a
18 witness form. He will be paid once I go through my
19 notes and figure out how many days he came in.
20 Obviously, what he got was a \$20 fee from the summer
21 visit.

22 Thank you.

23 THE COURT: That's a moot point. Thank you.

24 You are excused.

25 (Time noted: 3:53 p.m.)

1 Q And could you tell the Jury what is usually
2 is, more specifically?

3 A Well, the sugar in this case was lactose.

4 Q And what is lactose?

5 A It's a milk sugar.

6 Q What is it used for, to mix with heroin?

7 A It is used as a dilutant.

8 Q And are you familiar with the street term,
9 "cutting"?

10 A We're talking about the same thing, yes, Sir.

11 Q Would you tell the Jury please, what "cutting
12 heroin" means?

13 A Usually when you obtain heroin, it's usually
14 cut with some dilutant which would be sugar and the reason for
15 cutting it is for two purposes.

16 One would be to extend it and the other purpose--

17 Q You mean make a larger quantity?

18 A That's correct. The only other purpose would be
19 if you cut it low enough, it would be in the right dosage for
20 a person to take it without killing himself.

21 Q Okay, could you tell us what the gross weight
22 of Exhibit Number 1 was?

23 A The gross weight was 65 grams, Sir.

24 Q Okay, now when you--Sir, when you say gross
25 weight, could you tell the Jury or show the Jury what that

1 includes?

2 A The gross weight would be in the whole package
3 as it is. That includes the drug, the evidence, and the
4 handkerchief and the pouch, that's the gross weight.

5 Q What was the net weight?

6 A The net weight recorded was 25 point 7 grams.

7 Q And could you tell the Jury what the net weight
8 refers to?

9 A The net weight refers to the powder itself,
10 which is enclosed in this package.

11 Q This is in the package or the little packet?

12 A I'm sorry, in the little package.

13 Q Now, did you measure the strength of that
14 substance?

15 A Yes.

16 Q What was the strength?

17 A I found it to be 26.3% heroin hydrochloride.

18 Q Would you tell the Jury what that means?

19 A That means for every 100 parts of powder,
20 26.3 would be heroin hydrochloride.

21 Q Now, on this specific exhibit, when did you
22 pick it up and where did you pick it up from?

23 A I received this exhibit from the Evidence
24 Technician on August 6th, 1974.

25 Q Then what did you do with it?

1 A I then cut the bottom off, which you can see
2 the bottom of the pouch, I removed the contents, performed
3 my analyses and returned the contents back to the pouch,
4 resealed it with my seal.

5 Q Then what did you do with that whole Exhibit?

6 A I then returned it in tact to the evidence
7 technician.

8 Q When did you do that?

9 A The date was August 7th, 1974.

10 Q Now, when you talked about the strength per-
11 centage, can you tell the strength percentage of a packet of
12 heroin after its been stored a while?

13 A Yes. Possibly it would deteriorate somewhat,
14 depending on its condition.

15 Q The percentage would get lower?

16 A That would be correct.

17 Q And could you have two different percentages
18 from the same shipment of heroin?

19 A You could, depending for instance if they were
20 to add a dilutent like lactose or what ever they're going to
21 add to cut it. They may not make a uniform mixture so if
22 they were to take a portion from this side of the powder and
23 a portion from this side of the powder, you might get two
24 different results.

25 Q Now, Mr. Fonseca, I will show you what has been

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Garcia - direct

nostrils in the nose upon snorting.

Q And what is the meaning of the term, cut?

A Cut is a street term referred to by -- usually traffickers retail wholesale in which the original drug which they purchase is diluted. Terms of diluted, I mean the quantity is increased.

Q What is the meaning of the word, hit?

A It's synonymous with cut, they mean the same thing.

Q Could you tell us in what kind of quantities heroin is sold?

A Well, it varies.

MR. CERNY: I object to this, your Honor, irrelevant.

THE COURT: Overruled. You may answer.

A It varies. If we're talking about the retail, so-called junkie on the street, he will buy his heroin in terms of either bundles or what they call nickel and dime bags. That means small -- just enough for him to get one use of the heroin, for him to get his highs, or if he is sick, to relieve the pain.

Then we have what we call the retail dealer, who would buy in quantities of maybe up to one ounce. They get that heroin in ounce quantities, they dilute it and make bundles which are referred to as street packages.

A 50

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1 61

Garcia - direct

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Then we have the wholesale dealers that buy from kilo quantity dealers. They buy from pounds to kilos.

4

5

Then we have the importers who deal directly with large connections overseas.

6

Q Could you tell us the number of grams in an ounce?

7

A Approximately 25.5.

8

Q Agent Garcia, when was the first time you met

9

Leonard Dimitrio?

10

A First time was on August 5, 1974.

11

Q You're sure about that date?

12

A Positive.

13

Q On that date were you working for the Drug

14

Enforcement Administration?

15

A Yes.

16

Q Working in undercover capacity?

17

A Correct.

18

Q Could you tell us what you did on that day?

19

A Yes. On that date, arrangements were made for

20

the purchase of one ounce of heroin for approximately \$2,400.

21

At which time I proceeded in my official --

22

Q Could you tell us how those arrangements were

23

made?

24

A Through a confidential informant.

25

Q Was that the individual referred to as

A 51

Frankie Mambo?

MR. CERNY: I object and request that the Government not lead the witness. I object as to form.

THE COURT: The objection is overruled. The question has already been asked, but Miss Ross, when you get to critical matters, don't lead the witness.

Q Where did this meeting take place?

A It took place in Brooklyn in the vicinity of 86th Street and 7th Avenue. It was a Wetson's hamburger parking lot.

Q Tell us what occurred?

A Yes. I arrived on August 5th at approximately 4:30 P.M. at which time I drove into the parking lot and at that time I observed Leonard Dimitrio, Frank Iraes and the confidential informant approach my vehicle. At which time I observed Frankie Iraes enter his vehicle, Lenny Dimitrio and the informant approached my car, at which point I was introduced to Mr. Dimitrio.

After the introduction, I asked Mr. Dimitrio if he had the stuff, at which time he asked me, do I have the money.

At that point, Mr. Dimitrio withdrew a handkerchief, handed it to me, I took the handkerchief and observed inside the handkerchief the white substance which Mr. Dimitrio

DeMetrio-People-Direct

1
2 you?

3 A I would just call him and tell him I was
4 coming down.

5 Q Did you ever say I am coming down for heroin?

6 A No.

7 Q Did he always have drugs available?

8 A Not always.

9 Q There were times when there were no drugs
10 available?

11 A Yes.

12 Q How did you dispose of the drugs you got from
13 Mr. Rotolo at that point?

14 A I had cut it and I disposed of it in twenty-
15 five dollar pieces on the street.

16 Q Who did you do this with?

17 A Frank Irace.

18 Q Did you ever tell Carmine Rotolo that Frank
19 Irace was working with you?

20 A Not right away.

21 Q Did you ever tell him at any time?

22 A Yes.

23 Q Did you ever tell Frank Irace that Carmine
24 Rotolo was your source?

25 A Not right away.

DeMetrio-People-Direct

Q Did you ever tell him?

A Yes.

Q Do you remember ever buying any quantity from
Mr. Rotolo?

A Yes.

Q About when was that?

A April of '74.

Q And, where did this occur?

A 26 Broadway.

Q And how much did you buy?

A Four ounces.

Q Could you tell me, did you ask him for a
bigger quantity?

A Well, what happened, I had gone up to buy a
quarter of an ounce but he told me I was coming up too fast.
I was getting rid of it too fast to take the four ounces.

Q When you say, "he told me," who is "he?"

A Carmine. He said I was coming up to him too
fast and that it would hold me over for awhile.

Q Did he give you a price?

A Fifty-nine hundred dollars.

Q Did you have the fifty-nine hundred dollars?

A No.

Q Did you tell that to Carmine?

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Yes.

What did he say?

I could have it on consignment. Pay as I go along.

And, did you in fact get it on consignment?

Yes, I did.

Now, would you tell us how he got the drugs to you?

I met him in the lobby of 26 Broadway and we went up to the third floor. In the third floor storeroom. We went into the storeroom and he opened his locker and in a brown bag he pulled out the four-ounce package.

When you say, "a brown bag," will you describe it?

A regular bag. It looks like a shopping bag. I took the four ounces.

Now, what was the four ounces contained in?

In a clear plastic bag. I put it in my sock and I left.

What did you do with the four ounces?

I would cut the four ounces in time and sell it on the street at twenty-five dollars a piece.

What did you do with the four ounces, the package when you got home?

1 bag containing within it a smaller bag of white sort of
2 speckled white substance; do you recognize that?

3 A Yes, I do. It bears my initials and there is
4 a date on there when I opened this pouch.

5 Q And does it bear your initials? The same place
6 as the other two Exhibits we have just gone over?

7 A That is correct.

8 Q And did you perform a test on that Exhibit?

9 A Yes, I did.

10 MR. GOULD: Your Honor, again, subject to
11 connection, the Government would move to enter this
12 into Evidence.

13 THE COURT: Same position, Mr. Cerny?

14 MR. CERNY: Same position, Your Honor, as
15 Exhibits 1 and 2. Thank you.

16 THE COURT: Mark it into Evidence subject to
17 connection.

18 THE CLERK: The Government's Exhibit Number 3,
19 received in evidence, subject to connection.

20 THE COURT: As to both 2 and 3, of course,
21 Ladies and Gentlemen, you keep in mind we have yet,
22 the Government has yet to make any connection between
23 the Exhibits themselves and the facts of this case.

24 Q Now, again, do you remember what the results
25 were on that test?

1 Q Again do you remember what the results were
2 on that test?

3 A May I see the report?

4 Q I'm showing the witness 3500-29. What did that
5 turn out to be?

6 A That turned out to be heroin procaine and
7 sugar.

8 Q What is procaine?

9 A Procaine would be used as an adultrant.

10 Q And the sugar is a dilutent?

11 A Procaine is an adultrant.

12 Q Would you tell the Jury what an adultrant is?

13 A Well, in this case an adultrant would be some-
14 thing that would make you think that you are getting heroin,
15 but you're actually not. It's not an extender like lactose
16 would be. Although it is, I'd have to take that back, it is
17 an extender, but you might think you're getting heroin if you
18 mix heroin and procaine, it is because it is a drug itself.

19 Q But there was in fact also heroin?

20 A With sugar and it would have a singestic effect.

21 Q Would you tell the Jury what a singestic effect
22 is?

23 A Sometimes when you mix two drugs together one
24 will make the other drug do its job better.

25 Q Now, what was the gross weight of Exhibit Number 3.

1 A The gross weight received was 30.16 grams.

2 Q And what was the net weight?

3 A The net weight recorded was 55.14 grams.

4 Q Incidentally, again, on the other little packets
5 in the middle on the right hand side, are those your initials?

6 A Yes, these are my initials and the date.

7 Q Would you tell the Jury what the strength of
8 this heroin was in that Exhibit?

9 A The strength recorded was 5.6% heroin hydro-
10 chloride.

11 Q Now, that packet seems to have little speckles
12 in it or something. Can you explain, is that the same as
13 the heroin in Exhibit 1 and 2?

14 A This heroin is what we call brown heroin. Hero-
15 in coming possibly from a different source. I mean original
16 source.

17 Q Original source, you mean the Country of origin?

18 A That is correct.

19 Q Okay, now, where did you pick up--when did you
20 pick up Exhibit Number 3 for the test?

21 A I received Exhibit Number 3 on March 12th,
22 1975.

23 Q And where did you pick it up from?

24 A From the evidence technician.

25 Q And then what did you do with it?

1 A After taking the gross weight, I cut one end off,
2 removed the contents, performed the analysis and closed it
3 up in the same procedure and returned the evidence back to
4 the pouch. Heat sealed the pouch and returned it to the
5 evidence technician.

6 Q Now, again, that little sliver of plastic,
7 that's in that bag, is that the part that you cut off?

8 A That is correct.

9 Q Now, when did you return it back to the eviden-
10 ce clerk?

11 A It was returned on March 17th, 1975.

12 MR. GOULD: I have no further questions of
13 this witness.

14 THE COURT: Mr. Cerny, do you expect an
15 extended cross-examination?

16 MR. CERNY: Yes, Sir, I do, Your Honor.

17 THE COURT: All right, in that event, we
18 will recess at this time until 9:30 tomorrow morning.
19 I remind you, Ladies and Gentlemen, of what I told
20 you earlier. Do not discuss the case amongst your-
21 selves or with anyone else. Your function, as long
22 as the case continues, is to listen to and think about
23 it, but do not talk about it or read or listen to a
24 radio broadcast or anything of that sort. So, we
25 will adjourn for today and I ask you to return here

**CPIRT PF COURT OF APPEALS
SECOND CIRCUIT**

Index No.

**UNITED STATES OF AMERICA,
Plaintiff-Appellee,**

- against -

**CARMINE ROTOLO,
Defendant-Appellant.
On Appeal from the U.S. District Court for the
Eastern District of New York.**

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF

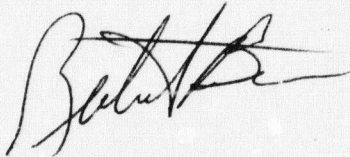
SS.:

I, **Robert Martinez** *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1165 Morris Avenue; Bronx, New York
That on the 23rd day of June, 19 77, deponent served the annexed

Brief & Appendix *upon* **U.S. Attorney Eastern Dist.** *attorney(s) for*
David Trager
in this action, at **225 Cadman Plaza**
Brooklyn, N.Y.

*the address designated by said attorney(s) for that
purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a
Post Office Official Depository under the exclusive care and custody of the United States Post Office
Department, within the State of New York.*

Sworn to before me, this 23rd
day of June, 19 77.


Robert Martinez

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979